United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1929

To be argued by
FRANK A. LOPEZ

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ROBERT C. SELLAROLE,

Appellant.

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Robert C. Sellarole[1] appeals from a Judgment entered against him on June 21st 1974 in the United States District Court for the Southern District of New York (Weinfeld, J.), sentencing him to two (2) years concurrent terms on his convictions for Conspiracy, Bribery and three (3) counts of Perjury.

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[1] Hereinafter referred to as either "Sellarole" or "appellant."

STATEMENT OF FACTS

(A) The Indictment

The first count of the indictment charged appellant, a former Commissioner of the Bergen County Sewer Authority, together with co-defendants Gordon Rodney, James W. Gorab, Herbert Slaitin, Johnson O. Lamont and Sheldon Zalkin with unlawfully, willfully and knowingly combining, conspiring, etc., with each other to violate 18 U.S.C. § 1952, in that the said defendants did allegedly use facilities in interstate commerce to commit the crime of bribery in violation of New Jersey Law.

The second count of the indictment charged that Sellarole together with defendants Rodney, Gorab, Slaitin, Lamont and Zalkin, used the facilities of interstate commerce to commit the substantive crime of bribery in violation of New Jersey Law.

The third, fourth, fifth and seventh counts[2] charged appellant alone with the crime of perjury for his Grand Jury testimony in which he could not remember conversations

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[2] The sixth count (perjury) was dismissed at the end of the Government's case.

with defendant Gorab relating to placing certificates of deposit with "any other banks"; that he did not have any discussions concerning the making of "any loans . . . involved with the negotiations for the placing of this certificate of deposit at the Sterling Bank"; that he did not have any conversations with defendant Rodney concerning the Sterling National Bank and that he furthermore did not have discussions with Olsberg relating to the investment of funds of the Sewer Commission.

(B) The prosecution theory of the case

In his opening statement to the Jury, the trial prosecutor announced to the Court and Jury that the Sterling Bank of New York was prone to and did in fact pay bribe money to induce the Bergen County Sewer Authority to make time deposits with the bank, as follows (7-8)[3]:

> "Mr. Sellarole, in the summer of 1972, was a Commissioner, Chairman, Commissioner of the sewer authorities, one of five or seven

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[3] Citations are to the original Record included within appellant's appendix.

> of them, and it is their say whether which banking institution will get the funds. During the summer he has a conversation with Gordon Rodney, one of the co-conspirators, one of the people on the New Jersey side of the transaction. During the course of the conversation when they discussed various business matters, Mr. Sellarole tells Mr. Rodney he is Commissioner of the Bergan County Sewer Authority and is looking for places to put Sewer Department deposits. Mr. Rodney, in turn, getting the message, goes to another man in New Jersey, Mr. Gorab, and tells Mr. Gorab that he has a connection in the Bergen County Sewer Authority where they can get public funds to transfer into banking institutions, and Gorab and Rodney have a discussion that they can make money in connection with that . . . Mr. Rodney, Mr. Gorab both get back to Mr. Sellarole and agree they can make money in connection with the transfer of Sewer deposits and it comes about in September of 1972, the first transfer is about to take place, and Mr. Rodney, Mr. Gorab, rather, calls Slaitin in New York, who has some banking contact in New York, and they learn the Sterling Bank of New York, where Mr. Zalkin is the vice president, is willing to, or through the people in New York, give a commission, fee, legal fee. That is a nice phrase for what is really a legal bribe payment in this case, a fee of $2,500 for the transfer of one million dollar time deposits." (Underlining supplied.)

As will be pointed out, in truth, the Sterling National Bank did not offer or pay a bribe to anyone. Instead, defendants Gorab, Slaitin and Lamont, together

with government informer Olsberg, conspired to make appellant Sellarole believe that Sterling was paying bribe money to obtain time deposits, when in reality the payments were made by defendant Lamont, a movie producer, who was endeavoring to secure bank loans to produce a movie and to strengthen his credit position by attracting time deposits to the Sterling National Bank, which had no knowledge that Lamont was paying out his own moneys and representing that he was doing this in behalf of the bank.

Sellarole was devoid of knowledge that he was being used by defendants Gorab, Slaitin and Lamont, and informer Olsberg, to transfer time deposits to Sterling, so that Lamont's credit position was strengthened in order for him to secure bank loans to produce his movie. What the prosecutor concealed from the Jury, and the Court, as well, was that appellant, as well as the Sterling Bank, were victims of the mechinations of four confidence men - Gorab, Slaitin, Lamont and Olsberg - who were only concerned with strengthening Lamont's credit position, and were willing to use fraud to accomplish it. The Government failed to reveal the true nature of the trans-

action and represented that the Sterling National Bank paid out bribe money, when in fact there was no connection with any such transaction.

(C) The Trial

(aa) The Government

The prosecution's first witness, Gordon Kenneth Rodney, a construction equipment broker by profession, but unemployed at the time of trial (21), testified that he met Sellarole through the latter's son, George, in the summer of 1972, at Laneve's Restaurant to try to sell him soil and gravel, since he was in the construction business (22). Appellant mentioned that he had a doctor friend, interested in building one family homes on his cattle ranch. Moreover, Sellarole indicated he was a Commissioner on the Bergen County Sewer Authority, and that this function was taking up more time than he had anticipated. Rodney then testified that he told Sellarole that he had been interviewed by a mortgage broker James Gorab for employment. He then frankly admitted that he began discussing the possibility of Sellarole's aid in placing time deposits of unused funds of the Bergen County Sewer Authority, so that they might

earn interest, until ready for use in construction projects. "I said Mr. Gorab having been in the finance business and now starting his own, it might be helpful in rolling and locating time deposit transfers. He said, 'I'm sure this would be helpful.' " (25)

Rodney telephoned Gorab to relay the contents of his conversation with Sellarole. Gorab indicated interest in "this cattle matter in particular, and he says I'm sure I can do something with my connections in New York City concerning the roll over of time deposits." (26) Rodney then telephoned Sellarole and they arranged to meet at the Trolley Diner in Hackensack. He told appellant that he had arranged with Gorab to find "sources for him to transfer the time deposits and that there would be fees involved. And he said, good, sounds helpful and he said but Ron, I'm only going to be talking with you. I'm (sic) going to get involved with all sorts of people I don't know and so forth. He said very basically when you know of a source who will pay a good rate of interest, prime or better, as I recall, the procedure would be that I would provide him with the name of the bank, it would be brought up at a regular meeting of the

Authority, and he would recommend here is a good rate of interest and recommend that it be taken. From that point on, as I understand it, I was never involved . . ." (28) Rodney then met Gorab at the home of the latter's parents, where he was then residing, and repeated the contents of his conversation with Sellarole (29-30). Gorab then telephoned Herb Slaitin in New York, mentioning that "he came across a situation of time deposits." He requested Slaitin's aid in locating a bank and then put Rodney on the phone to further talk with his associate (30-31). A few days later, Gorab had Rodney arrange a three party meeting concerning "the cattle situation," which "lasted about an hour. . . . No other matter was discussed . . . and a meeting was arranged for a Sunday morning for the three of us to go to Sussex County and actually make a physical review of this cattle farm." (31-33) In September, 1972, Gorab told Rodney that Sterling Bank in New York City was willing to pay a $2,500 fee for a one million dollar time deposit transfer, which information, Rodney relayed to Sellarole at Adam's Diner in Saddle Brook. It was agreed that they would split the $2,500 fee, with half of Rodney's share going

to Gorab (34-36).

Late in September, Rodney, Gorab, appellant's son, George, and appellant met at Laneve's Restaurant, where they "discussed cattle." (37) Gorab and George Sellarole then left the room, after Gorab pointed to his pocket (38). Gorab then asked Sellarole whether another three million dollar transfer could be made to the Sterling National Bank and appellant answered affirmatively (40). The meeting concluded and when Rodney and Gorab were alone, Rodney complained that only $1250.00 was paid for the million dollar time deposit to Sterling, instead of the $2,500.00, as promised (41).

Rodney and Sellarole had another meeting. This time at the Oakland Diner, where Rodney told appellant that Gorab was impatient concerning the next three million dollar time deposit promised, but Sellarole said he was working on it (42-43).

On October 1st, 1972, Rodney attended Gorab's wedding, where Gorab instructed him to follow up the three million dollar proposed transfer of time deposits. Rodney asked Gorab for money. The next morning, Gorab's wife, Linda, wrote Rodney a check for one hundred dollars (44).

During the time Gorab was on his honeymoon, Gorab's mother, Jean, notified him that she had received a $2,500 check "delivered to the house by a man from New York." (47-48) Rodney could not understand why this $2,500 check was sent over, since no additional Authority funds had been transferred to Sterling, other than the first million for which payment had been made (49). Jean Gorab cashed the check and gave Rodney $1,875.00, for which he signed a receipt (50-51). On either October 7th, 8th or 9th Rodney gave appellant $1,250.00, at Adam's Diner (51-52). Rodney kept $625.00 (53).

On October 15th, 1972, Rodney spoke with Jean Gorab, who told him she had received a telephone call from Zarkin of Sterling Bank, asking where the $3,000,000.00 deposit was and that he also called the Bergen County Sewer Authority, but they said they knew nothing about it (53-54). Rodney telephoned Zarkin to assure him that, the three million dollar time deposit was being worked on (54-55).

Rodney received a phone call from Herbert Olsberg, a friend of James Gorab, who told him that he had a bank in Long Island, interested in a five million dollar time

deposit (56). Rodney and Olsberg met at Howard Johnson's, in Wayne, New Jersey. Rodney showed him a file on a summer camp owned by two brothers. Olsberg then revealed that he was the person who delivered the $2,500.00 check to Mrs. Gorab and that he was the Sterling National Bank connection (60).

The following morning, Rodney met Sellarole at the latter's office. Appellant complained of Zarkin's telephone calls to the Authority, particularly to Mr. Guido, the Trustee. Rodney then told him that he had an offer of $17,000.00 for five million dollars in time deposits and appellant said he would get to work on it (61-62).

Rodney spoke to Olsberg over the telephone, to tell him to stop Zarkin from making telephone calls and that his offer concerning five million dollars in time deposits was relayed to appellant (63-64).

In the latter part of October, 1972, Rodney had a conversation with Gorab, who complained that a second million dollar time deposit had not been transferred to Sterling, despite an advance payment of $2,500 for it (65).

On October 31st, Rodney introduced Olsberg to ap-

pellant in the latter's office. Olsberg inquired about the proposed additional five million dollars in time deposits and mentioned that he had cautioned Zarkin not to make any more telephone calls (68).

On November 9th, another meeting took place in Sellarole's office among the same parties. Appellant said he was working on the five million dollar deposits and Olsberg inquired when the second million dollar time deposit would be transferred for which payment had already had already been made. Appellant indicated that it would be done either on the 17th or 20th of December (70).

At still another meeting, Sellarole offered to return the $1,250.00, for his failure to deposit with Sterling a second million dollars (73).

Rodney received a telegram from Gorab, apparently trying to blackmail his "associates," by threatening to reveal what was going on, unless they paid him off (77).

On March 15th, 1973, Rodney saw appellant in a sand-pit at Mahwah, New Jersey. Sellarole told him he had been to the United States Attorney's office on March 13th and had been questioned about time deposits made at the Sterling Bank and whether he had received fees in regard

to their transfer. Rodney said that he had been similarly questioned, but had denied any payoffs. Appellant suggested that they need a lawyer and that Rodney should get in touch with Olsberg, so that they could get their stories straight (79).

That evening, Olsberg telephoned Rodney, who expressed fear that the F.B.I. was probing (80).

Rodney told appellant he was scheduled to appear before the Grand Jury on March 20th. On March 17th, the two of them went to the home of Adolph J. Galluccio, appellant's lawyer for the purpose of Rodney also retaining him. Galluccio declined the retainer for possible conflict of interest. Rodney testified that appellant admitted to his lawyer that a transfer of one million dollars in time deposits had actually been made for which a fee had been paid, but that no deposit of a second million dollars had been made, in conjunction with the $2,500.00 advance payment fee. Appellant further confessed to his attorney that he and Rodney received a fee and that Sellarole had received eight hundred dollars for his first fee and $1,250.00 for his second (86-90).

Galluccio did not cross-examine Rodney, on his testimony concerning declarations made by appellant to him in confidence, while preparing a joint defense revealed by Rodney. On further cross-examination, however, Rodney admitted that Sellarole "had put forth the name of Sterling Bank before the board because it was, in fact, paying the highest rate of interest which could be obtained." (183)

The next prosecution witness was James W. Gorab, a mortgage broker and nursery man. In August of 1972, he met Gordon Rodney and in the same month, met with Rodney and appellant to look over a cattle farm in Sussex. He discussed with Rodney at his mother's house the possibility of placing time deposits for a fee (257-260).

He testified that he followed up Rodney's proposition, as follows: ". . . .I called several banks and couldn't get any interest with the local bank. So I talked to Mr. Slaitin. We were discussing other business and I, as a closing remark, casually said to him, 'By the way, do you have any place you can put in time deposits and get a fee?' He said, 'I don't know, I will call you back.' . . . . I spoke to Mr. Slaitin on numerous occasions and he called me one day and said that he had

'come up with an idea, that he had a client (Lamont) that had a questionable loan -- not a questionable loan. A loan that the banks look at, but if they could get a time deposit stuck into a bank, they would be assured of getting a loan and for this they would pay us a fee.' " (underlining supplied.) (261-262, 348)

The following day, Slaitin called Gorab to relay a deal he had with Sterling and offered a fee of $2,500.00 for a one million dollar time deposit with Sterling Bank. Gorab checked with Rodney, who checked with Sellarole, who agreed and provided 6% interest be paid on the time deposit (262-297).

After the million dollars was transferred to Sterling Bank, Slaitin said the fee would only be $1,250.00 on this initial transaction (298). Gorab planned that appellant would get one-half of the fee and he and Rodney would split the balance (299).

"(Slaitin) asked (Gorab) if there were any other monies available. He needed three million more, and (Gorab) said I would check on it that evening." (301)

Gorab received a check in the sum of $1,250.00 made payable by Johnson Lamont (302).

On September 28th, 1972, Gorab and Rodney met with appellant and his son in a restaurant. Gorab paid appellant's son, George, eight hundred dollars in the men's room. George returned to the group and told his father that everything was all right. Sellarole promised another three million dollars in time deposits to be made within two or three weeks (303-305).

On October 1st, Gorab got married. It was arranged at the wedding that Olsberg would tell his mother, during his absence on his honeymoon, what deposits were needed, which she would communicate to Rodney. She would receive $2,500.00 for each one million dollar time deposit (307).

Linda Gorab, James Gorab's wife, wrote a check to Rodney for one hundred dollars (309).

At the wedding, Olsberg said he would bring out $2,500.00 advance payment for another one million dollar time deposit (310).

Gorab telephoned his mother and learned that $2,500.00 had been delivered and that she had placed Rodney and Olsberg in communication (310). When Gorab returned, he had a telephone talk with Olsberg, who complained that a time deposit had not yet been made for the $2,500.00 advanced (311). Late in October, Gorab met with Sellarole

at Marriott Motor Lodge and complained that the transfer, for which an advance payment had been made, had not yet been effected. Appellant, in turn, complained of telephone calls to the Authority from someone representing himself as an official of the Sterling Bank (314).

Charles M. Welch, an attorney for the Port Authority and a next door neighbor of James Gorab, testified that the latter asked him to deliver an envelope which someone would drop off at his office. Gorab picked up the envelope at the witness' house (265-269).

William L. Feisher, an F.B.I. agent, testified that Olsberg was fitted with a KEL transmitting device, and he was equipped with a cassette recorder (270-272). The tapes of conversations with various persons and Olsberg, were played for the Jury.

Fred Lorber, a Grand Jury stenographer, verified his stenography notes of Sellaroie's Grand Jury testimony as a foundation for the perjury counts (325).

Karen J. Bopp, an employee of the Federal Reserve Bank, testified that on the 22nd day of September, 1974, a one million dollar transfer was made from the account of the Bergen County Sewer Authority in Garden State Bank

to Sterling National Bank (400-404).

Eric K. Knudsen, a data processing auditor with Prospect Park National Bank testified that a check for $1,250,00 was cashed. On September 28th, 1972 for the Gorab account and four hundred dollars in cash was deposited (415).

Appellant's Grand Jury minutes which were the basis for the perjury counts were read to the Jury (415).

Dorothy Redmond, the Grand Jury forelady, testified that when appellant gave his Grand Jury testimony, he was sworn, and that the role of the Grand Jury was to investigate money placed in Sterling National Bank, to see if any moneys were paid to anyone and to determine who was involved.

Jean Gorab, James' mother, testified that she had a conversation with Olsberg at her son's wedding on October 1st, 1972, and a few days later, Olsberg gave her checks, totalling $2,500.00, from which she gave Rodney $1,875.00 (426-431).

The prosecution then rested. The Court dismissed count six of the indictment, one of the perjury charges, but denied defense applications to dismiss the conspiracy,

bribery and balance of the four perjury counts (457-465).

(bb) The Defense

The first defense witness was George Sellarole, a beer distributor salesman, the son of appellant, who testified that he met Rodney in a bar. Rodney gave him his card, indicating that he dealt in equipment and soil. George gave the card to Sellarole (485-486). He went to Laneve's Restaurant with appellant and met Gorab and Rodney. They discussed cattle (487-491). He did not receive an envelope from Gorab (492).

Robert Sellarole then testified on his own behalf that he had been one of seven Bergen County Sewer Commissioners (512). He indicated that the Authority did not advertise or auction for banks that might be interested in time deposits (513). The bonds issued by the Authority paid 5½% interest and so, it was necessary to use banks that would pay at least that return for funds not being used in construction (514). Sellarole met Rodney at Laneve's Restaurant and mentioned that banks were not interested in Bergen County Sewer Authority certificates of deposit because of an unusually low prime rate of interest (517). He had a second meeting with Rodney, at

which George and Gorab were present. They discussed improvement of a cattle herd (518). They did not discuss certificates of deposit. He did not receive either money or an envelope from anyone (519). Rodney recommended Sterling National Bank, as one that would pay a higher rate of interest for Authority deposits than New Jersey banks. He telephoned Mr. Zarkin of Sterling to tell him minimum surplus and security requirements. They agreed on a 6% rate of interest (520), which was the best offer at the time since the prime rate was then about 5 3/8% (525).

Appellant claimed that he never received moneys for placing funds and when he met with Olsberg at his office on October 13th, it was concerning mortgages (526-527).

When he met with Gorab, it was to admonish him not to bother Dr. Wager in regard to his cattle, since his wife was then a terminal cancer patient (533-534).

On November 10th, Sellarole received $1,250.00 from Olsberg as "a referral fee that I was entitled to for the various projects I had recommended to him," particularly the Vitale matter (563).

On January 11th, 1973, Olsberg told appellant that

he could not place the Vitale mortgage, without a certificate of deposit and defendant stalled him (585).

On March 13th, 1974, two F.B.I. agents approached Sellarole at a car wash line, and asked him to accompany them to testify that same day before a Grand Jury. Without prior warning him that he was a target of the investigation nor giving him the opportunity to consult with counsel (594).

On March 17th, 1973, he went to attorney Galluccio's house with Rodney, who told Sellarole that he wanted to retain Galluccio (600). Galluccio said that he could not represent both defendants (602). Frank Riviello was not at Galluccio's house with appellant at the time of this meeting (782).

The trial prosecutor cross-examined appellant as to confidential declarations made to his attorney, both by himself, and by Mr. Rodney relating to their common defense (748-751):

> "Q. And did Mr. Galluccio explain to Mr. Rodney why, if there were no bribes committed here, he couldn't represent the both of you?"
> Q. What else did you discuss at that time at Mr. Galluccio's house?

Q. Did Mr. Galluccio have a yellow pad at his house on that day?
Q. Did he use a yellow pad during the course of the conversation with you and Mr. Rodney?"

(cc) Rebuttal

When the defense rested, the prosecution proceeded with rebuttal witnesses, beginning with David C. Hynes, Vice-President and Treasurer of the Interchange State Bank in Saddle Brook. He testified to a cash deposit made on September 29th, 1972 by Sellarole for $2,000.00 (811-816).

Next, Willy James Pickett, an employee for New Jersey Bell Telephone Company testified to the long distance calls made by Sellarole (816).

Herbert Olsberg, a Government informer, was the last rebuttal witness. He testified that he was a self-employed financial consultant, with two prior criminal convictions (824). He was a relocated witness, under a new name, whose expenses were paid by the Government. In September, 1972, he became a federal undercover agent (824). He was wired for sound and supervised by Agent Fleischer. Fleisher was in the closet with Agent Boland, when Olsberg spoke with Gorab. He gave information re-

garding the Bergen County Sewer Authority to the agents (826-828). He attended Gorab's wedding, wearing a body recorder and Fleisher monitored the talk from a truck. Several days later, he gave Mrs. Gorab two checks made by Lamont which he received from Lamont and Slaitin (829). Jean Gorab gave him Rodney's telephone number (831).

Rodney and Olsberg discussed time deposits and Rodney arranged for Sellarole to meet Olsberg at appellant's office (831).

Olsberg and Sellarole discussed a possible mortgage deal with one Vitale. Olsberg met Vitale at his apartment at 300 East 74th Street (836).

However, Olsberg testified that the $1,250.00 that Sellarole received was unrelated to Vitale, since Olsberg never received money from Vitale (842). Olsberg denied ever giving money to Sellarole (843). He insisted that he discussed time deposits with Sterling National Bank with appellant (844).

Olsberg testified that a one million dollar time deposit transfer to Sterling was due to take place in November (847), and that he discussed a $17,000 fee with appellant for a five million dollar time deposit (860).

Olsberg admitted that it was Slaitin and Lamont that had duped Sellarole into believing that Sterling was paying a fee for time deposits. "This is a time deposit that had been paid for by Mr. Lamont and Mr. Slaitin, $2,500.00, which I had delivered to Mrs. Gorab in two payments for the transfer of a million dollars, at the direction of Mr. Lamont and Mr. Slaitin." (853)

Olsberg revealed that Gorab, by telegraph and telephone, tried to blackmail Sellarole and Rodney, by threatening to inform the authorities unless paid $20,000 (873).

Olsberg duped Rodney out of $1,000 for TV's which he never delivered, which he maintained was his only way to recover some $1,000 that Rodney had been chiseling from him (874-875).

On cross-examination, Olsberg admitted submitting written reports to Fleisher, which Galluccio demanded, but which, Sagor represented that he no longer possessed (877-879). However, the prosecutor developed through Olsberg that the material contained in the reports were incorporated in Agent Fleisher's reports that were available (882).

Olsberg's testimony was interrupted for Agent Fleisher to testify and explain that Olsberg had supplied him with four or five handwritten reports, which he reduced to FB-302's (FBI investigation reports), reflecting all of the information given by Olsberg (884-885). Fleisher then admitted destroying the original reports made by Olsberg (896).

Olsberg resumed the witness stand and testified that a man named Kessler introduced him to Gorab, who, in turn, introduced him to Slaitin and who, in his turn, introduced him to Lamont, in early September 1972 (893).

Olsberg also affirmed that Lamont signed both checks delivered by him to Jean Gorab (897).

Slaitin and Lamont introduced Olsberg to Zalkin (911). When asked about Lamont and Slaitin, Olsberg replied, "I would have no idea what their exact relationship was except they were doing business with one another and they probably were partners in other things." (913)

Olsberg solicited Gorab for five million dollars in deposits (922). He admitted being paid for his informing by the F.B.I. in cash, up to $1,700.00 per month (927). The F.B.I. paid him $13,000.00 for six months

cooperation (934).

On cross-examination, Mr. Galluccio asked Olsberg (948):

> "Q. Now, do you know how much the bank paid for that first million dollars? That September 22nd. If you know?"

The Assistant U.S. Attorney made no effort to correct the misapprehension of counsel (as well as the Court and Jurors), that the bank never made any payment for time deposits. The prosecution remained silent, despite the obvious defense confusion. Olsberg answered, but counsel for the defense did not understand the significance of the response (948):

> "A. Mr. Lamont issued the check to Mr. Gorab for that amount."

Anthony J. Passeretti, an Internal Revenue Agent, testified, as an expert in public accounting, that " 'up front' is a term which refers to a fee paid to a person or persons for their services in a certain transaction. It has nothing to do with rate of interest".(1048)

On Surrebuttal, Agent Fleisher identified one of the reports turned in by Olsberg, but admitted the others were missing (1051-1052).

Appellant then testified that the $2,000 in cash he deposited at Interchange State Bank was part of a $5,500.00 payment to his construction company by Michael Veltri Builders, of which $3,500 was paid to Penn Rail, Inc. for equipment rentals for a particular job (1056-1058).

The Jury found appellant guilty of conspiracy, bribery and three counts of perjury (four, five and seventh) and not guilty of the third count, also perjury.

ARGUMENT

POINT I

CREATING A FALSE IMPRESSION AND ARTFULLY CONCEALING THAT APPELLANT AND STERLING NATIONAL BANK WERE VICTIMS OF A CONSPIRACY BY CO-DEFENDANTS GORAB, SLAITIN AND LAMONT TO DEFRAUD STERLING NATIONAL BANK INTO MAKING A LOAN TO PRODUCE A MOVIE, DEPRIVED APPELLANT OF HIS CONSITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Count one of the indictment charged Sellarole with conspiring with co-defendants Rodney, Gorab, Slaitin, Lamont and Zalkin to accept a bribe for placing time deposits belonging to the Bergen County Sewer Authority with Sterling National Bank. Count two charged appellant, while acting in concert with the same co-defendants, with actually accepting a bribe, in fulfillment of the purposes of the alleged conspiracy.

In short, the Assistant United States Attorney attempted to give the impression to the Jury that the parties named were involved in a conspiracy to receive bribes from Sterling National Bank for placing public funds with that institution, knowing full well, that this was not the truth. Only by a minute and careful examination of the trial record- an advantage that no

Judge and Jury could possibly enjoy during the heat of battle - is it possible to piece together the true nature of the crime, in which appellant and the Sterling National Bank were the victims of the machinations of three confidence men, James Gorab, Herbert Slaitin and Johnson Lamont.

Appellant was a Commissioner of the Bergen County Sewer Authority. In addition, he owned a successful construction business. His son, George, had the misfortune to meet Gordon Kenneth Rodney in a bar, during the course of his beer route business. They got into a conversation. Rodney held himself out as a construction equipment broker and expressed interest in meeting with George's father, the appellant, in the hopes of arranging a sale to him of construction equipment or the like. Appellant did meet with him, at which time Rodney revealed that he had been interviewed for employment with James Gorab, who held himself out as a mortgage broker.

When Rodney learned that appellant was a Commissioner on the Bergen County Sewer Authority, he immediately offered appellant aid in locating banks that would pay high rates of interest for Authority moneys, not then in

construction use. Not a word was spoken, concerning a bribe, according to the testimony of prosecution witness, Rodney. "I said Mr. Gorab having been in the finance business and now starting his own, it might be helpful in rolling and locating time deposit transfers. He said, 'I'm sure this would be helpful.' " (25)

According to Rodney's testimony, he then relayed the content of his conversation with appellant to Gorab. Gorab responded by contacting Herb Slaitin, a mortgage broker in New York City (30-31). Somehow or other, not appearing on the record, a Government informer, Herbert Olsberg got involved in the transaction.

Slaitin was representing Lamont, a movie producer, seeking to obtain a loan from Sterling National Bank, to go forth with his projects. The rub was that Sterling would not make the loan Lamont required without security. It was then that Slaitin came up with his plan.

Only by carefully linking up testimony can the true nature of the transaction be understood. Thus, James Gorab testified, "If called several banks and couldn't get any interest with the local bank. So I talked to Mr. Slaitin. We were discussing other business and I,

as a closing remark, casually said to him, 'By the way, do you have any place you can put in time deposits and get a fee?' He said, 'I don't know, I will call you back . . . . I spoke to Mr. Slaitin on numerous occasions and he called me one day and said that he had come up with an idea, that he had a client (Lamont) that had a questionable loan -- not a questionable loan. A loan that the banks look at, but if they could get a time deposit stuck into a bank, they would be assured of getting a loan and for this they would pay us a fee.'" (underlining supplied.) (261-262, 348). The payoff checks were not made by any officer of the Sterling National Bank, but by none other than Johnson Lamont, the movie producer (302). This was verified by Olsberg, who let it slip, "This is a time deposit that had been paid for by Mr. Lamont and Mr. Slaitin, $2,500.00, which I had delivered to Mrs. Gorab in two payments for the transfer of a million dollars, at the direction of Mr. Lamont and Mr. Slaitin." (853)

Nevertheless, throughout the trial the Assistant United States Attorney planted the erroneous impression that appellant had been bribed by the Sterling National

Bank, beginning with his opening statement to the Jury (7-8):

> ". . .it comes about in September of 1972, the first transfer is about to take place, and Mr. Rodney, Mr. Gorab, rather, calls Slaitin in New York, who has some banking contact in New York, and they learn the Sterling Bank of New York, where Mr. Zalkin is the vice president, is willing to or through the people in New York, give a commission, fee, legal fee. That is a nice phrase for what is really a legal bribe payment in this case, a fee of $2,500 for the transfer of one million dollar time deposits."

As has been pointed out, there is not the slightest evidence that Sterling had notice that a bribe was to be offered or paid to any person. Nevertheless, from the onset of the trial prosecutor planted the erroneous idea that there was a conspiracy afoot for the bank to bribe Sellarole to use his influence in getting public funds transferred to that institution.

Mr. Galluccio, appellant's counsel had been completely duped by the deceitful presentation of the case, as can be perceived by the following question posed by him, in the course of his cross-examination of Olsberg, the Government informer (948).

"Q. Now, do you know how much the bank paid for that first million dollars? That was September 22nd. If you know?"

The trial assistant made no effort to correct Mr. Galluccio. He knew that the bank had not paid a penny bribe money. Yet, it was his strategy to dupe the defense, as well as the Court and Jury and so permit the erroneous impression of defense counsel to remain uncorrected.

In truth, appellant had been the unknowing victim of a conspiracy among Gorab, Slaitin and Lamont to dupe him into using his influence to transfer time deposits to the bank to secure loans for Lamont from the banking institution. The true transaction could have supported an inference that appellant had no idea at the time of the transaction that any bribe was to be paid, irrespective of whether he received any money at some future date. The law requires criminal intent at the time of the transaction. The unexpected receipt of moneys subsequent to the consummation of a conspiracy or bribery may, perhaps be unethical, but it could not support a conviction for crimes. Criminal intent must coexist with the criminal act, both in terms of time and space.

Indeed, the testimony of government witness, Rodney, that appellant "had put forth the name of Sterling Bank before the board because it was, in fact, paying the highest rate of interest which could be obtained," (183) would help support an inference that at the most, he had been taken in by a trio of razor sharp hucksters.

Furthermore, a frank disclosure of the true nature of the transaction - a conspiracy to dupe the Sterling Bank into making a production loan to movie maker Lamont - would have cut deeply into the credibility of the prosecution witnesses and given credence to appellant's testimonial warranty of his innocence.

The cases are legion that any prosecutorial effort to manipulate facts is a denial of due process of law and a conviction obtained cannot stand. "A judgment of conviction based to an important degree upon so speculative and uncertain a manipulation of figures. . . . cannot stand." Lenske v. United States, 383 F.2d 20 (9th Circ., 1967). Where a co-defendant testified thay defendant was in his car at the time the robbery took place, but the prosecution concealed that the co-defendant had also given a prior statement that defendant was only there to

assist him to repair his automobile, the concealment and distortion of facts was reason enough to reverse a judgment of conviction. United States v. Hibler, 463 F.2d 455 (9th Circ., 1972).

> "There is no doubt that the prosecution in a criminal trial has a duty of candor toward the defendant . . . . This duty is an ingredient of due process. The test is whether the undisclosed evidence was so important that its absence prevented the accused from receiving his constitutionally guaranteed fair trial. That defense counsel did not specifically request the information, that a diligent defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are are conclusive; due process can be denied by failure to disclose alone."

What was distorted and concealed in the case at bar was the very essence of the transaction. The distortion precluded a trial for appellant that could, in any sense, be characterized as fair.

In United States v. Keogh, 440 F.2d 737 (2nd Cir., 1971), Judge Friendly set forth "three categories of cases relation to prosecutorial non-disclosure":

> "(1) Where the prosecutor's suppression is deliberate by which we include not merely a considered decision to suppress, taken for the very purpose of obstructing, but

> also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention.
> (2) Where the prosecution fails to furnish evidence favorable to the accused upon request; and
> (3) Where the suppression was not deliberate in either of the senses we have included and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use."

The suppression in the case at bar fell into the first category. It is this type of suppression that automatically calls for a new trial.

"For a prosecutor to convery, or even to permit, a false impression, invades the area of due process. . . It has been said that the more deliberate the intent, the greater the invasion." Christofer J. Donnelly, 473 F. 2d 1236 (1st Circ., 1973). The reports are replete with reversals of convictions where the Government wilfully created a false impression, as in Campbell v. United States, 429 F.2d 209 (D.C., 1970), where

> "the Government relied heavily on the assumption that appellant received his gun wound in the robbery with which he was charged. . .Now it appears that appellants wound was unrelated to the robbery. Under the circumstances, elemental due process considerations require that the conviction

be reversed."

In the celebrated case of Miller v. Pate, 386 U.S. 1, (1967), the prosecutor misled the Court and Jury, by representing that dried-up paint found on the defendant's shorts was blood. The conviction was overturned, with the Court writing that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."

The false impression created by the prosecution in the case at bar amounted to obstruction of justice, pure and simple. It is undisputed that appellant never had had any personal contact with Slaitin and Lamont and so had no way of knowing the nature of their scheme that worked to drag him down with them. Not only was the trial assistant guilty of failing to disclose the vital information that these men had embarked upon a scheme to dupe appellant into transferring time deposits to the Sterling National Bank, so that Lamont could be approved for a movie production loan, but that Lamont himself, was paying Gorab moneys and wanted Sellarole to believe it was being paid by Sterling. Instead of frankly revealing the plot of these blackguards, the prosecutor obstructed justice by not only concealing it, but by creating a

false impression that Sterling National Bank was paying bribes for time deposits. No trial can ever be characterized as fair, given such prosecutorial tactics.

POINT II

IN VIOLATION OF THE SIXTH AMENDMENT, THE INDICTMENT FAILED TO FURNISH APPELLANT WITH NOTICE OF THE NATURE AND CAUSE OF THE ACCUSATION.

Count one charged appellant with conspiring with co-defendants Rodney, Gorab, Slaitin, Lamont and Zalkin to commit the crime of bribery and count charged him with acting in concert with the same five, in the commission of the substantive act. Nothing could have been more misleading and depriving of his Sixth Amendment right to notice of the nature and cause of the accusation. Indeed, with such misleading statement of the transaction, it was virtually impossible for counsel to prepare a defense. What the indictment charged, never happened. There was a conspiracy among Gorab, Slaitin, Lamont and Government informer Olsberg to dupe Sterling National Bank into making a loan to Lamont by a complex series of transactions calculated to deceive appellant and Zalkin,

Vice-President of the bank. The latter two were the real victims of this crime.

The purpose of the conspiracy was not to commit bribery, but rather to dupe appellant into transferring Bergen County Sewer Authority funds to the bank, by giving people the impression that the bank was paying bribes to accomplish this, when such was not the fact. Indeed, Lamont wrote checks out to Gorab, which was the basis for the bribery charge. But Lamont was not an officer nor employee of the bank and in no way was he acting as its agent.

Indeed, neither appellant nor Zalkin had any idea what Lamont and his associates were carrying out. In no way was appellant a conspirator with Gorab, Slaitin and Lamont, nor was he acting in concert with them, since he could not possibly have had the requisite intent to do so. He could not conspire with them, for the simple fact that a conspiracy is an agreement, requiring a meeting of the minds and he had no idea of the agreement they had entered into. This was a conspiracy, pure and simple, by four men to dupe a bank into making a loan to a movie producer, a conspiracy, concerning

which appellant knew nothing. Yet, the indictment fails to furnish any notice that such was the transaction and to that extent was in violation of the Sixth Amendment.

> "An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him . . . is defective, although it may follow the language of the statute. . . A bill of particulars cannot save an invalid indictment . . . Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038, 8 L.Ed.2d 240 (1962).

To charge a victim with conspiring with his oppressor is to denigrate the Sixth Amendment to the point of destruction. And yet, that is exactly what took place in the case at bar.

In charging appellant with conspiracy and substantive acts, the Government had a duty to spell out the true nature of the transaction. This it failed to do. Instead it took a shortcut that would lead any reasonable person to believe that the basis for the transaction was the corruption of appellant by the Sterling National Bank.

To aggravate the deceit, in his opening statement to the Jury, the trial assistant repeated that Sterling National Bank was prone to bribe appellant, knowing full well, that that was not so.

The indictment in the case at bar was fatally defective. Instead of enlightening, it mislead. It served no function, other than to perpetuate a deceit. It failed to afford appellant the notice required by the Sixth Amendment, in order to defend himself.

POINT III

APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS INFRINGED BY TESTIMONY CONCERNING CONFIDENTIAL DECLARATIONS MADE BY HIM TO HIS LAWYER AND BY CROSS-EXAMINATION BY THE UNITED STATES ATTORNEY DELVING INTO CONFIDENCES WITH HIS ATTORNEY.

On March 17th, 1973, Gordon Rodney accompanied appellant to the home of the latter's lawyer, Adolph J. Galluccio, for the purpose of Rodney retaining him. Galluccio refused to accept the case, due to possible conflict of interest. However, during the course of the interview, which was for the purpose of Rodney and appellant preparing a joint defense, according to Rodney,

Sellarole admitted to his lawyer that a one million dollar time deposit to Sterling National Bank was made for a fee, but that the second planned transfer of one million dollars, for which an additional fee of $2,500.00 had been paid in advance had not been made. Rodney further testified that appellant confided in his lawyer that he had received $800 for his first fee and $1,250.00 for his second (86-90).

This was not the limit of the infringement upon appellant's Sixth Amendment right to confidentiality in his conferences with counsel. The trial prosecutor cross-examined him by brazenly intruding into the area of confidentiality (784-785):

> "Q. And did Mr. Galluccio explain to Mr. Rodney why, if there were no bribes committed here, he couldn't represent the both of you?
> Q. What else did you discuss at that time at Mr. Galluccio's house?
> Q. Did Mr. Galluccio have a yellow pad at his house on that day?
> Q. Did he use a yellow pad during the course of the conversation with you and Mr. Rodney?"

Under the circumstances of this case, the presence of Gordon Rodney did not destroy the confidential nature of appellant's disclosures to his lawyer, since Rodney

was present to prepare a joint defense with appellant. At that time, their interests were not conflicting. Rodney had not yet elected to testify for the prosecution. He was on notice that he would have to testify before the Grand Jury, and was desirous of obtaining legal counsel. The fact that Mr. Galluccio advised him that their might be a conflict of interest precluding his representing both of them did not dilute the confidentially of the exchanges.

It requires no citation of authority that the privilege attaches to all declarations to enable counsel to advise a client whether or not he is in a position to afford him full representation.

The presence of a third person may or may not destroy the privilege, depending upon the circumstances. Thus, if the third person's presence refutes that the declarations were made in confidence, the privilege would not attach and testimony is properly admissible concerning them. However, there may be circumstances where the presence of a third person will not whittle away the privilege one iota, as where the third person and the client have a community of interest at the time and are

preparing a joint defense with counsel. To hold otherwise would preclude any safety for jointly charged defendants preparing a joint defense, since the risk is always present that a co-defendant might change his plea to guilty and elect to testify for the Government. To classify declarations made in the furtherance of a joint defense unprivileged is to destroy the effectiveness of counsel. A joint defense invariably requires joint preparation. In Cafritz v. Koslow, 167 F.2d 749 (1948), it was stated:

> "If the circumstances do not imply confidentiality to a communication between the client and his attorney privilege does not attach and the presence of a third person (other than the agent of either client or attorney) generally rebuts the presumption of confidentiality. 'It follows, of course, a fortiori, that communications to the third person in the presence of the attorney are not within the privilege.' "

The test for survival of confidentiality despite the presence of a third person is whether there is "identity of interest in the litigation then pending between" the declarant and the third person. Where a debtor confesses his obligation to his creditor in the presence of the former's attorney, the declaration loses its confidential

tone and is a proper subject of disclosure, the ratio decidendi being that the relationship of the third party to the declarant is overtly conflicting, so that it would not be expected that the declarant intended that his words be kept in confidence. Cafritz v. Koslow, supra.

> "The presence of a third party, particularly if he is an opposing party, indicates that the communication is not confidential or privileged. . . (But) when two persons address a lawyer as their common agent, their communications to the lawyer, so far as concerns strangers, will be privileged." Baldwin v. Commissioner of Internal Revenue, 125 F. 2d 812 (9th Circ., 1942).

Moreover, it is irrelevant whether the relationship of attorney and client eventially ripens between counsel and the third person, overhearing the clients confidences. As was written in Baldwin, supra

> "The information received by the counsel witnesses was attributable solely to their professional character. It was given to them for advice, and it is immaterial here to determine, under the circumstances surrounding the consulation whether the actual relation of attorney and client existed" . . . . All of the cases cited by the Government to support the position that the presence of the son at some of the conferences destroyed the privilege are cases where the dispute was between the two parties to the conference with the attorney. There the

> rule . . . . comes into play, and allows the attorney to testify as to negotiations between the parties. But in the instant case the Commissioner is a stranger to the negotiations and is not claiming under either the mother or the son. It is our opinion and we hold that in such circumstance the privilege is not destroyed."

A case in point that declarations made for a joint defense retain their confidentiality is Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965).

> "Where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings . . . Applying this principle to the facts of our case, we hold that Hunydee's admissions . . . were within the attorney-client communication privilege. These statements apprised the respective attorneys of Hunydee's position at that time and influenced the course of their representation. The admission of testimony concerning the statements made at the pre-indictment conference of the co-defendants and their attorneys was therefore error."

Indeed, Mr. Galluccio was driven to a point where he could not effectively cross-examine Rodney and thereby effectively represent appellant. It would have required

him to delve into confidential declarations that Rodney had made to him that lead him to decline to represent him on grounds of possible conflict of interest. The trial assistant was charged with knowledge that by soliciting testimony from Rodney that impinged upon the attorney-client privilege, he was destroying the efficacy of counsel for appellant, who was then burdened with conflicting duties, to wit, the vigorous defense owing to his client and the preservation of the sancitity of the declarations that Rodney had made to him. By boldly intruding into a hallowed ground of confidentiality, the prosecutor destroyed the efficacy of the trial. Inroads into the area of confidentiality can only work to destroy the effectiveness of the right to counsel, upon which our entire justice system is built. It is too sacred to be tolerated and the error in this case is of such enormous proportions that a conviction obtained in face of it, may not be permitted to stand.

POINT IV

MISLEADING THE JURY AND FAILING TO CHARGE THAT PERJURY CAN ONLY BE PROVEN BY THE TESTIMONY OF TWO WITNESSES OR ONE WITNESS PLUS CORROBORATING CIRCUMSTANCES REQUIRES A REVERSAL OF THE PERJURY CONVICTIONS.

In instructing the Jury on the proof necessary to support a perjury conviction, the Court mislead the Jury (1116):

> "The government in the main relies upon the direct evidence of witnesses as to what allegedly are the true facts as to which it charges the defendant made false statements. The government is not required to prove its case by any particular number of witnesses or by documentary proof or any other type of evidence."

The Court, in instructing the Jury, overlooked the special evidentiary rule concerning proof necessary to support a perjury conviction.

> "The rule requires direct proof of the crime by two witnesses who testify that the accused violated his oath, or direct proof by one witness plus corroborating circumstances . . . The doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some 'overt act' from which the jury may infer the accused's actual belief . . . The perjury rule requiring direct evidence cannot be applied unless the court specifically

> declares what are the overy acts which the jury must find, and which the court decides are properly supported under the perjury rule and of themselves form a rational support for finding that the accused's oath and his belief conflicted. United States v. Remington, 191 F.2d 246 (2nd Circ., 1951). The falsity of testimony in a perjury case must be proved by the testimony of two witnesses, or the testimony of one witness, plus some other corroborative evidence." United States v. Brandyberry, 438 F.2d 226 (9th Circ., 1971).

This evidentiary rule is practically jurisdictional in nature, in that no perjury conviction can be permitted to stand, without a Jury being instructed as to its content. In the case at bar, it is possible that the Jury disbelieved one or more prosecution witnesses, or whatever was supposed to be relied upon for corroboratory circumstances - the nature of which was not conveyed to the Jury - and supported its conviction on the testimony of one witness. To allow a conviction to stand in the face of such omission of the Court's duty, is to allow a conviction to stand on mere speculation.

It must be noted that the Jury found appellant not guilty on county three, charging him with lying to the Grand Jury concerning conversations he allegedly had with

James Gorab regarding certificates of deposit. James Gorab was the prosecution witness who had sent Rodney a blackmail telegram, threatening to expose the time deposit machinations, unless he were paid $20,000. By finding appellant not guilty on count three, the Jury plainly rejected the testimony of Gorab. It may well be that it might have rejected the testimony of either Rodney or Olsberg, as well. Thus, the failure to so charge the evidentiary rule in this case, leaves a danger, far from academic, that Sellarole may have well been convicted on the testimony of a single witness, a result that cannot be permitted to stand in a perjury indictment.

POINT V

THE QUESTIONS POSED BY THE UNITED STATES ATTORNEY BEFORE THE GRAND JURY WERE TOO VAGUE ON WHICH TO SUPPORT A PERJURY INDICTMENT.

Counts three, four, five, six and seven charged appellant with separate and distinct crimes of perjury. Count six was dismissed by the Court and the Jury found appellant not guilty on count three, which related to alleged conversations with James Gorab, an indication

that the Jury rejected the testimony of this prosecution witness. However, the Jury did find appellant guilty on counts four, five and seven.

Count four consisted of a series of four questions and answers pertaining to "any discussion" appellant might have had "concerning the placing of this certificate of deposit about making any loans to any persons." The three follow up questions clearly related to this first question, concerning "making any loans." Appellant's denials were technically correct. No prosecution witness testified that there was any transaction, whatsoever, in respect to loaning Authority funds, but rather in respect to time deposits. The inartistic manner of phrasing questions, invited appellant's negative responses. They were technically correct. There was no conspiracy charged to accept bribes in consideration for loans, but rather for time deposits.

> "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. . . . The examiner's awareness of unresponsiveness should lead him to press on for information he desires. . . ." Bronston v. United States, 409 U.S. 352 (1973).

Count five related to a series of seven questions

and answers, also propounded before the Grand Jury. The difficulty is that the prosecutor never got down to what he was driving at. For instance, he asked appellant:

> "Did you have any conversations with Mr. Rodney about this matter?"

The answer was technically correct:

> "A. I might have mentioned to him that a CD had taken place, yes."

Again, the assistant inartistically pressed on:

> "Q. Was there any other discussion with Mr. Rodney concerning the Sterling Bank?"

Again, the answer he received was technically correct:

> "A. No. There was not."

It is the theory of the prosecution that appellant had conversations with Rodney concerning bribery, not the architecture or financial structure or whatever else the prosecutor was driving at, of Sterling National Bank. If the assistant was trying to elicit a response from appellant concerning bribery, then he had a duty to directly ask questions concerning that subject, not beat around the bush and expect appellant to guess at what he was driving at.

In this regard, it must be pointed out that the

prosecution unethically abused the function of a Grand Jury, which is to conduct investigations and secure information. Appellant was not brought before the Grand Jury to fulfill any such laudatory purpose. Rather, he was craftily swept up and taken before that body so that he could be indicted for perjury for denying his involvement in the conspiracy and bribery charges. In short, the Government used the Grand Jury to impose a penalty upon appellant for pleading not guilty. However, as deplorable as was this abuse of process. The prosecutor had a duty to ask proper questions, not play coy, and then seek to have appellant convicted for failing to fall into his trap. Appellant had no duty before the Grand Jury - assuming arguendo he was properly before that body in the first instance - to volunteer information to a prosecutor who did not employ sufficient art in properly framing his questions.

What has been said concerning counts four, five and seven, can be repeated concerning count seven, consisting of two extremely vague questions. The second question was as follows:

> "Q. Did you have any conversation with Mr. Olsberg in connection with investing funds of the Sewer Commission?"

The answer, "No," was technically correct. The term investment is normally associated with placements of capital in proprietory ventures, such as stocks, bonds or partnership enterprises, not savings deposits in banks. No person about to make a deposit in a bank would ever characterize the venture as an investment. And it may well be that the conviction on count seven rested on appellant's response to another inartistically framed question. If the prosecutor wanted to know whether appellant had ever discussed the making of time deposits in banks with Olsberg, he should have asked him just that. Cute questions invite cute answers. Moreover, Bronston, supra, teaches that they cannot be the basis for a perjury indictment.

POINT VI

APPELLANT'S APPEARANCE BEFORE THE GRAND JURY WAS ILLEGALLY COMPELLED, FOR THE FRAUDULENT PURPOSE OF INDICTING HIM FOR PERJURY FOR PLEADING NOT GUILTY AND IN VIOLATION OF 18 U.S.C. 600

On March 13th, 1974, two F.B.I. Agents approached appellant, then waiting on line to have his car washed, and directed him to accompany them to testify that very

same day before a Grand Jury, without warning him that he was a target of the investigation (594). There was no Court order issued for his production. Yielding to a badge of authority, he accompanied them. Therefore, there was no opportunity to seek the advice of counsel, which is absolutely indispensible for a layman appearing before the Grand Jury, where the complexity of legal probelms loom as a challenge to the most astute of lawyers. What is most appalling is that these federal agents did not even bring appellant before a United States Commissioner in order that his rights might be protected by a neutral, detached judicial officer, but swept him before a Grand Jury, which, in its final analysis and in a practical sense, is just another branch of the prosecutorial team.

It is the function of the Grand Jury to investigate crime, not to penalize its targets for exercising their Constitutional right to plead not guilty - which is exactly what was intended and what happended in the case at bar. Appellant was clearly a target of this investigation. Indeed, the prosecution had employed Herbert Olsberg as an undercover agent to ferret appellant out.

Olsberg had performed his task with acumen, delivering to his mentors taped recordings of conversations with appellant as well as most of the other persons allegedly involved in the investigation. There was nothing that Sellarole could have added to the fund of knowledge already possessed by the prosecutor and little doubt that appellant would be indicted for both conspiracy and bribery. The only purpose for which appellant was brought before the Grand Jury was to get him to deny involvement in the crime - a most natural reflex for any person accused, whether rightly or wrongly - and then indict him for perjury, for exercising his right to plead not guilty, so that, if he managed to slip away concerning the original charges, he could be held for perjury.

Under such circumstances, any lawyer worth his salt would have advised appellant to take the Fifth Amendment and refuse to answer any questions. Therefore, it was incumbent upon the prosecutor to use shock methods - to sweep up appellant unexpectedly and drag him before a Grand Jury before he would have opportunity to consult with counsel. And so, instead of seeking a Court order for his production, as required under the circumstances

by 18 U.S.C. 6003, the United States Attorney sent two F.B.I. agents to bring him in.

However, in Mallory v. United States, 354 U.S. 449, (1957), the Supreme Court, in interpreting Rule 5A of the Federal Rules of Criminal Procedure, held that a defendant taken into custody must be brought before a Commissioner, without unnecessary delay. Official disobedience to this rule stamps as illegal any statement made by the defendant, which, of course, cannot be used against him. What Mr. Justice Frankfurter wrote in Mallory, is clearly applicable to the case at bar:

> "Since such unwarranted detention led to tempting utilization of intensive interrogation easily gliding with the evils of 'the third degree,' the Courts held that police detention of defendants beyond the time when a committing magistrate was readily accessible constituted 'wilful disobedience of law.' In order adequately to enforce the congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention."

It matters little that appellant made his damaging statement behind the closed and secret doors of the Grand Jury, rather than a police station. Indeed interrogation before a Grand Jury can even be more ominous, where the

intervening assistance of counsel is not permitted. Under the circumstances, absent a Court order for appellant's appearance before the Grand Jury, the federal agents had a duty to produce him before a Commissioner, where that neutral judicial officer would have opportunity to advise him of his rights. Indeed, it was presumptuous of executive officers to take it upon themselves to pick up appellant and bring him before a body like a Grand Jury and thereby expose him to a plethora of dangers that only a well trained legal mind could foresee. The actions of the prosecutor in employing such shock tactics are unconscionable and should be roundly deplored. Indeed, the price for prosecutorial smoothness is too high when a citizen can be whisked before a Grand Jury without notice, to get him indicted for perjury for denying the crime for which he will be accused and thus place a penalty upon his plea of not guilty.

New York State provides automatic immunity for a person subpoenaed before a Grand Jury.

> "By virtue of the Constitution of this State (Art. I, 6) - and it is solely the Constitution of New York with which we are now concerned - a prospective defendant or one who is a target of an

> investigation may not be called and examined before a Grand Jury and if he is, his constitutionally conferred privilege against self-incrimination is deemed violated even though he does not claim the privilege . . . A violation of the constitutional privilege carries with it a dismissal of the indictment returned by the Grand Jury before which the defendant testified." People v. Steuding, 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959).

It is true that federal law has not gone that far as to confer automatic immunity upon a potential defendant brought before a Grand Jury. Were that so, appellant would have had no need to give evasive answers and wind up with a perjury indictment. But, on the other hand, federal law is not that far behind New York, as many a prosecutor would like to have the Courts believe.

October 15th, 1970, Congress repealed 18 U.S.C. 3486 (c) and enacted in its place 18 U.S.C. 6003. The former section was niggardly, in its authority for the grant of immunity in exchange for incriminating testimony. It was only permitted in cases of conspiracy to assassinate or kidnap the president, national security and immigration matters. The new statute authorizes a grant of immunity in any case where "the testimony or other information from such individual may be necessary

to the public interest."

It was obvious under the new enactment that a properly counselled appellant would be "likely to refuse to testify. . . on the basis of his privilege against self-incrimination" and so, it was incumbent upon the United States attorney to obtain a court order requiring him to testify, but with the consequences set forth in 18 U.S.C. 6002, and the immunization provided therein.

Obviously under the section a perjury indictment will not lie, without an order directing a defendant to testify as provided by the statutory scheme or at least first bringing him before a United States Commissioner to be warned of his rights, including the right to immunity in consideration for incriminating testimony, as required by Mallory, since the testimonial basis for such charge is compulsion, as a matter of law.

> "This constitutional protection (against self-incrimination) must not be interpreted in a hostile or niggardly spirit. . . . No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a far reaching evil - a recurrence of the Inquisition and

> the Star Chamber, even if not in their stark brutality." Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956).

United States v. Monia, 317 U.S. 424 (1943) interprets a statute quite similar to the one at bar. The Sherman Anti-Trust Law provides for automatic immunity for a witness before a Grand Jury. Mr. Justice Roberts writing for the Court ruled that the right to immunity does not turn on a request. "An investigation by a grand jury is a criminal case. The amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him." It can hardly be said that a person swept up by federal agents and brought within the secret confines of a Grand Jury, without intervention of counsel, court or commissioner, testifies "voluntarily." Mr. Justice Roberts went on to write, that "Congress evidentally intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he could have complete immunity from prosecution respecting any matter substanially connected with the transactions in respect of which he testi-

fied, or retaining the right to prosecute by foregoing the opportunity to examine him." The interpretation given to the immunity provisions in the Sherman Anti-Trust Act should apply to the newly enacted blanket immunity statute. Appellant had a right to be apprised of his rights under the 1970 law prior to giving testimony, either by counsel or court, and failing to afford it, nullifies the indictment.

Hoffman v. United States, 341 U.S. 479, (1951) stands for the broad proposition that a "witness may not be compelled to answer, where possibly he might incriminate himself."

A prospective defendant should not be compelled to admit to a crime before a Grand Jury, so that he could avoid a perjury charge, when the consequence is his certain indictment for the substantive crime, resulting from his own incriminatory declarations. Nor should it be compelled to take an equally dangerous course of denying the crime and risk a perjury charge, merely for exercising his right to plead not guilty. The third choice is equally dangerous. For him to announce his refusal to testify on grounds that his answers might

Authority it would be easier for him to transfer money

incriminate him is to practically assure that a Grand Jury will indict him for the substantive charges. He is entitled to know that since 1970, the law affords him a fourth alternative - either to be granted immunity or to be excused from appearing before the Grand Jury. The shock tactics of the Government in whisking appellant before the Grand Jury, without a Court order, an appearance before a Commissioner or opportunity to consult with counsel, nullified the indictment. It would be safe to say that no F.B.I. agent ever warned appellant that he had a right to demand immunity for his testimony under 18 U.S.C. 6002, 6003.

CONCLUSION

The judgment below should be reversed and the indictment dismissed or a new trial ordered.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

U.S.A.,

Appellee,

against

Affidavit of Personal Service

SELLSROLE,

Appellant.

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James Steele, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the **7th** *day of* **August** *19 74 at* **Foley Square, New York**

deponent served the annexed Appellant's Brief *upon*

Paul J. Curran-U.S. Attorney for the Southern Dist.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

James Steele

Print name beneath signature

JAMES STEELE

***Sworn to before me, this* 7th**

day of **August** *19 74*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975